

1 THE HONORABLE BENJAMIN H. SETTLE
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13 UNITED STATES DISTRICT COURT
14 WESTERN DISTRICT OF WASHINGTON
15 AT TACOMA
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17 JOHN DOE #1, an individual; JOHN DOE
18 #2, an individual; and PROTECT
19 MARRIAGE WASHINGTON,
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21 Plaintiffs,
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23 v.
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25 SAM REED, in his official capacity as
26 Secretary of State of Washington and
27 BRENDAL GALARZA, in her official
28 capacity as Public Records Officer for the
29 Secretary of State of Washington,
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31 Defendants.
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No. C:09-cv-05456 BHS

INTERVENOR WAFST'S OPPOSITION TO
PLAINTIFFS' MOTION TO CONTINUE
TRIAL

NOTED ON MOTION CALENDAR

Friday, September 9, 2011

34 I. INTRODUCTION
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36 Intervenor Washington Families Standing Together ("WAFST") opposes Plaintiffs'
37 motion to continue the trial and related dates. It is three weeks before trial. It has now been
38 more than two years since WAFST (and other Washington citizens seeking access to these public
39 records) submitted a public records request under Washington's Public Records Act seeking the
40 Referendum 71 petition sheets. It has been nearly two years since the Referendum 71 election
41 itself. It is past time for the merits of Plaintiffs' claim to be resolved. Plaintiffs' motion should
42 be denied.
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INTERVENOR WAFST'S OPPOSITION TO
PLTFS' MOTION TO CONTINUE TRIAL (NO.
09-05456) – 1
LEGAL21666467.1

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II. ARGUMENT

As the Court is aware, this case involves issues arising during the course of the 2009 Referendum 71 campaign. The referendum petition sheets have been sealed from public view for over two full years as a result of the initial proceedings in this case and their subsequent appeal to the Ninth Circuit and review by the U.S. Supreme Court. After rejecting Plaintiffs' facial challenge to Washington's Public Records Act, the Supreme Court remanded the proceeding to this Court for consideration of Plaintiffs' "as applied" challenge. This Court set the trial date in this case in January of this year and counsel for all parties have prepared for trial accordingly. The State, Washington Coalition for Open Government ("WCOG"), and WAFST have all devoted considerable resources to careful examination of the materials produced by Plaintiffs, identifying trial exhibits, and deposing the witnesses identified by Plaintiffs and otherwise preparing for trial. Counsel and the relevant witnesses have cleared their calendars and stand ready to proceed. Now, at the last possible moment, Plaintiffs seek a continuance, not because of the unavailability of witnesses or illness but because one of Plaintiffs' several trial counsel has given notice and will be leaving the employ of lead counsel's law firm. But even with Mr. Jared Haynie's departure, lead counsel, Mr. James Bopp, and his local counsel, Mr. Stephen Pidgeon (who attended the depositions) remain available for trial. With all due respect to Plaintiffs' counsel, and acknowledging the significant role played by Mr. Haynie to date, the motion should be denied.

This is not the first time that Plaintiffs have sought to delay the resolution of this case because one of Plaintiffs' counsel withdrew. Three of Plaintiffs' attorneys have previously appeared and withdrawn in this matter; most recently, Mr. Haynie. Dkt. #119, Dkt. #187, Dkt. #262. Mr. Haynie first appeared in this matter in January 2011, shortly before the then-deadline for the filing of dispositive motions. Upon his appearance, the parties agreed to a motion to extend the trial and related dates to allow Mr. Haynie sufficient time to familiarize himself with the case and to prepare summary judgment briefing. Dkt. #188, at 2-3.

**INTERVENOR WAFST'S OPPOSITION TO
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1 Plaintiffs now seek a continuance because Mr. Haynie, at some unknown time, decided to
 2 accept (and, apparently, to begin) a new job just three weeks before trial. The defendants,
 3 including WAFST, have already agreed to one delay to accommodate Plaintiffs' substitution of
 4 attorneys. It cannot, at the eleventh hour, agree to another.
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6 Moreover, Plaintiffs have presented no colorable explanation for why the pretrial
 7 conference cannot go forward on September 12, 2011 or why the trial must be continued. The
 8 pretrial conference has been set for September 12 since January 12 of this year. Dkt. #191.
 9 Plaintiffs have long been represented by multiple counsel admitted to practice before the
 10 Western District of Washington. Plaintiffs provide no explanation for why Mr. Bopp would
 11 have elected to schedule a conflicting speaking engagement for September 12 given that he has
 12 "principal responsibility" for trying this case and thus has *always* been obliged to attend the
 13 pretrial conference. Local CR 16(l).¹ Nor have Plaintiffs provided any explanation for why Mr.
 14 Steven Pidgeon would be unavailable on September 12. Plaintiffs also have not explained why
 15 they have not submitted or could not submit a pro hac vice application from another Bopp
 16 Coleson attorney. The Court swiftly granted previous applications (including that of Mr.
 17 Haynie), and there is no reason to believe it would not have done the same in advance of the
 18 September 12 conference. Self-inflicted scheduling conflicts for speaking engagements do not
 19 and cannot warrant relief from court-imposed deadlines.

20 Nor is delay warranted in any event. Plaintiffs have already candidly admitted that they
 21 intend to present the case almost entirely on the basis of deposition testimony, with the exception
 22 of just four live witnesses – likely no more than a day or two of testimony. The State, WAFST,
 23 and WCOG will present at most seven live witnesses, most to offer discrete and limited

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 51 ¹Speaking engagements are, without a doubt, important to the practice of law, but few courts have modified long-standing court deadlines to accommodate counsel's public appearances, particularly where, as here, both the date of the pretrial conference *and* the obligation to attend that conference have been known to counsel since January – eight months ago – and the conflicting speaking engagement is only now being identified as a reason to delay and reschedule not only the pretrial conference *but the entire trial itself*. Allowing such engagement to upset long-standing trial schedules would work a grave disservice to the regular administration of justice in this, and any other, court.

1 testimony. This trial, even if every one of the live witnesses identified to date actually testifies in
 2 person, will be modest in length at best. Such a trial hardly requires a large team of lawyers with
 3 a full complement of junior associates. Mr. Pidgeon, local counsel, is a skilled and experienced
 4 trial lawyer and could beyond a doubt handle the entire trial on his own without assistance from
 5 Mr. Bopp or his associates. With Mr. Bopp by his side, Plaintiffs will be represented by one of
 6 the best known and skilled national advocates for restricting access to putatively public records.
 7 Plaintiffs are fully and competently represented.

8 Moreover this Court's disposition of the pending summary judgment motions may
 9 obviate the need for trial entirely. Case schedules and busy dockets often combine to leave
 10 summary motions unresolved until shortly before trial. While WAFST fully believes that
 11 dismissal of Plaintiffs' claims on summary judgment is appropriate, it stands fully prepared to try
 12 this case at trial if the matter moves forward. It has prepared for trial while the summary
 13 judgment motions remaining pending and certainly will continue to do so. Moreover, any
 14 change to the long-standing trial date will undoubtedly cause scheduling conflicts and future
 15 delay, particularly given the number of parties and counsel involved in this matter. There is no
 16 need or warrant to delay the resolution of this case further.

17 Finally, and wholly apart from counsel's scheduling preferences or conflicts, there is a
 18 larger public interest in resolving this case expeditiously. It has now been more than two full
 19 years since these public records have been sealed from public view. The United States Supreme
 20 Court has soundly rejected Plaintiffs' primary facial attack on Washington's Public Records Act
 21 to these referendum sheets, leaving only an afterthought "as applied" challenge that is weak at
 22 best. The public's interest in timely access to these records should be considered paramount
 23 here. That interest counsels for swift resolution of the remaining claims, either summarily or at
 24 trial. Further delay, WAFST respectfully submits, is unwarranted here.

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2 **III. CONCLUSION**
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For the reasons stated above, WAFST submits that the Court should deny Plaintiffs' motion to delay the pretrial conference and related trial dates.

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INTERVENOR WAFST'S OPPOSITION TO
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2011, I electronically filed

INTERVENOR WAFST'S OPPOSITION TO PLAINTIFFS' MOTION TO CONTINUE TRIAL in the above-referenced case with the Court via CM/ECF, which system will send notification of such filing to counsel of record.

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CERTIFICATE OF SERVICE (NO. 09-05456) – 1

1 I certify under penalty of perjury that the foregoing is true and correct.
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4 DATED: September 7, 2011 *s/ Kevin J. Hamilton*
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